

No. 87-73

(4)

Supreme Court, U.S.

FILED

AUG 21 1987

JOSEPH F. SPANOL, JR.  
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In the Supreme Court of the United States

OCTOBER TERM, 1987

KATHERINE B. NICHOLS, ETC., PETITIONERS

v.

DON RYSAVY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT  
IN OPPOSITION

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### **QUESTIONS PRESENTED**

1. Whether the limitations period in 28 U.S.C. 2401(a) bars Indian petitioners' suits against the United States claiming that the Secretary of the Interior illegally issued certain fee patents to their forebears between 1916 and 1921.
2. Whether the United States is an indispensable party to petitioners' suits to recover land sold or mortgaged by their ancestors, where the gravamen of their complaint is that the original fee patents for the land were illegally issued by the United States so that all later transfers of the property were void.



## TABLE OF CONTENTS

	Page
<b>Opinions below . . . . .</b>	<b>1</b>
<b>Jurisdiction . . . . .</b>	<b>1</b>
<b>Statement . . . . .</b>	<b>1</b>
<b>Argument . . . . .</b>	<b>7</b>
<b>Conclusion . . . . .</b>	<b>13</b>

## TABLE OF AUTHORITIES

Cases:

<i>Antoine v. Washington</i> , 420 U.S. 194 (1975) . . . . .	10
<i>Big Spring v. United States Bureau of Indian Affairs</i> , 767 F.2d 614 (9th Cir. 1985), cert. denied, No. 85-1380 (June 16, 1986) . . . . .	9
<i>Blake v. Arnett</i> , 663 F.2d 906 (9th Cir. 1981) . . . . .	10
<i>Block v. North Dakota</i> , 461 U.S. 273 (1983) . . . . .	8, 13
<i>Christensen v. United States</i> , 755 F.2d 705 (9th Cir. 1985), cert. denied, No. 85-372 (June 16, 1986) . . . . .	5, 9
<i>County of Oneida v. Oneida Indian Nation</i> , 470 U.S. 226 (1985) . . . . .	9
<i>County of Thurston v. Andrus</i> , 586 F.2d 1212 (8th Cir. 1978), cert. denied, 441 U.S. 952 (1979) . . . . .	2
<i>Fields v. United States</i> , 423 F.2d 380 (Ct. Cl. 1970) . . . . .	10
<i>Heff, In re</i> , 197 U.S. 488 (1905) . . . . .	2
<i>Hodel v. Irving</i> , No. 85-637 (May 18, 1987) . . . . .	10
<i>Lone Wolf v. Hitchcock</i> , 187 U.S. 553 (1903) . . . . .	10
<i>Loring v. United States</i> , 610 F.2d 649 (9th Cir. 1979) . . . . .	5
<i>Menominee Tribe of Indians v. United States</i> , 726 F.2d 718 (Fed. Cir.) cert. denied, 469 U.S. 826 (1984) . . . . .	9
<i>Mottaz v. United States</i> , 753 F.2d 71 (8th Cir. 1985), rev'd, No. 85-546 (June 11, 1986) . . . . .	4, 6, 7, 8, 10, 12, 13
<i>Northern Cheyenne Tribe v. Hollowbreast</i> , 425 U.S. 649 (1976) . . . . .	2
<i>Poafspybitty v. Skelly Oil Co.</i> , 390 U.S. 365 (1968) . . . . .	10
<i>Provident Tradesmens Bank &amp; Trust Co., v. Patterson</i> , 390 U.S. 102 (1968) . . . . .	6, 10, 11, 12
<i>United States v. King</i> , 395 U.S. 1 (1969) . . . . .	8

Cases – Continued:	Page
<i>United States v. Mitchell</i> , 445 U.S. 535 (1980) .....	8
<i>United States v. Nice</i> , 241 U.S. 591 (1916) .....	2
<i>Walters v. Secretary of Defense</i> , 725 F.2d 107 (D.C. Cir. 1983) .....	9
<i>Werner v. United States</i> , 188 F.2d 266 (9th Cir. 1951) ....	9
<i>Worcester v. Georgia</i> , 31 U.S. (6 Pet.) 515 (1832) .....	10
 Treaty, statutes and rule:	
Treaty with the Sioux Indians, Apr. 29, 1868, 15 Stat. 635 .....	2, 10
Act of Mar. 2, 1889, ch. 405, 25 Stat. 888 .....	2
Act of Feb. 26, 1927, ch. 215, 44 Stat. 1247, 25 U.S.C. 352a .....	3
Act of Feb. 21, 1931, ch. 271, 46 Stat. 1205, 25 U.S.C. 352b .....	3
Burke Act, ch. 2348, 34 Stat. 182, 25 U.S.C. 349 .....	2, 6
Indian General Allotment Act, ch. 119, 24 Stat. 388, 25 U.S.C. 331 <i>et seq.</i> .....	1, 2, 5
Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, 25 U.S.C. 461 <i>et seq.</i> .....	3
Quiet Title Act, 28 U.S.C. 2409a .....	8
25 U.S.C. 345 .....	4, 5, 8, 9, 12
25 U.S.C. 347 .....	10
28 U.S.C. 2401(a) .....	4, 5, 7, 8, 9
28 U.S.C. 2415 .....	9, 10
Fed. R. Civ. P. 19(b) .....	10

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## BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-40) is reported at 809 F.2d 1317. The opinions of the district courts (Pet. App. 41-60 and 61-107) are reported at 610 F. Supp. 1245 and 621 F. Supp. 637.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 2) was entered on January 15, 1987. A petition for rehearing was denied on February 25, 1987 (Pet. App. 1). Justice Blackmun extended the time for filing the petition for a writ of certiorari to July 10, 1987, and the petition was filed on July 9, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. In 1887, Congress enacted the Indian General Allotment Act, ch. 119, 24 Stat. 388, 25 U.S.C. 331 *et seq.*, in an attempt to encourage individual rather than tribal

ownership of land. The object of the Act was to foster assimilation of the Indians "as self-supporting members of our society and relieve the Federal Government of the need to continue supervision of Indian affairs." *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 650 n.1 (1976). Under this statute, allotments were to be held in trust by the United States for a period of 25 years at the end of which time the allottee was to receive a fee patent.<sup>1</sup>

In 1906, Congress amended Section 6 of the General Allotment Act by passing the Burke Act, ch. 2348, 34 Stat. 182, 25 U.S.C. 349. The Burke Act was intended "to accelerate the assimilation of the Indians by truncating the length of the trust period and benefits derived therefrom for Indians determined to be competent." *County of Thurston v. Andrus*, 586 F.2d 1212, 1219 (8th Cir. 1978), cert. denied, 441 U.S. 952 (1979). Two changes were made in the allotment system. First, an Indian allottee could not become a citizen until he received a patent in fee.<sup>2</sup> Second, the Secretary of the Interior was authorized, "in his discretion," to issue fee patents "whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs \* \* \*" (25 U.S.C. 349).

Between 1906 and 1916, the Secretary of the Interior granted early fee patents only to allottees who applied for them and who, on the recommendation of the local Indian

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<sup>1</sup> Two years after the enactment of the General Allotment Act, the Great Reservation of the Sioux Nation, established under the Treaty with the Sioux Indians, Apr. 29, 1868, 15 Stat. 635, was divided into seven separate reservations. The Act of March 2, 1889, ch. 405, 25 Stat. 888, provided for the allotment of lands on the seven reservations and for the issuance of trust patents to individual allottees by incorporating Section 6 of the General Allotment Act.

<sup>2</sup> This change was made in response to the Court's decision in *In re Heff*, 197 U.S. 488 (1905), which had construed Section 6 of the Dawes Act as conferring citizenship on Indians upon the issuance of a trust patent, thus subjecting the Indians to state laws. In *United States v. Nice*, 241 U.S. 591 (1916), the Court overruled *In re Heff*.

superintendent, were found competent to receive them (Pet. App. 11). In 1916, however, a new policy began of issuing the fee patents without application whenever the allottees were found competent to receive them. The Department of the Interior established "competency commissions" to visit the reservations and issue these "forced fee patents." *Ibid.* In 1917, the Commissioner of Indian Affairs issued a Declaration of Policy under which Indians determined to be "able-bodied, adult [and] of less than one-half Indian blood" were presumed competent (*id.* at 12). In 1919, the presumption of competence was expanded to include Indians "of one-half Indian blood" (*id.* at 13). Thousands of Indians received fee patents under these policies (*ibid.*).

In 1921, the practice of issuing fee patents without prior application was discontinued, due in large part to an acknowledgment that the allotment policy had been unsuccessful. A later reexamination of that policy resulted in the passage of two "cancellation Acts" in 1927 and 1931. Act of Feb. 26, 1927, ch. 215, 44 Stat. 1247, 25 U.S.C. 352a, and Act of Feb. 21, 1931, ch. 271, 46 Stat. 1205, 25 U.S.C. 352b. These two Acts authorized the cancellation and return to trust status of certain fee patents that had been issued to Indians without application or consent. The Acts did not apply, however, to land that had already been mortgaged or sold by the allottees. The new federal policy with regard to Indian allotments was affirmatively expressed by the enactment of the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, 25 U.S.C. 461 *et seq.*, which continued indefinitely the trust status of restricted lands.

2. Petitioners are all descendants of Sioux Indians who were issued land allotments under the General Allotment Act and then received "forced fee patents" for the land between 1916 and 1921. Each allottee subsequently sold the property or lost title through foreclosure. Pet.

App. 15. Petitioners filed 14 separate actions against the United States, the State of South Dakota and various private defendants seeking the return to trust status of the property which had been allotted to petitioners' ancestors. Petitioners challenged as void the issuance by the Secretary of the Interior of the fee patents for the property in question. They claimed, inter alia, that the patents had been issued in violation of the General Allotment Act because they were issued without prior application of the allottees and because individualized competency determinations were not made prior to issuance of the patents. Petitioners also challenged the Secretary's reliance upon the age and "blood quantum" of the allottee in determining competency as a violation of equal protection.

In three consolidated actions brought in the Western District of South Dakota, the district court dismissed the complaint as against the United States on the ground that the United States had not waived its immunity to suit under 25 U.S.C. 345, which allows Indian plaintiffs to sue the United States in order to receive an original allotment to which they claim entitlement, but does not waive immunity for suits "in relation to" allotments that have already been granted by fee patents (Pet. App. 51-55). Cf. *United States v. Mottaz*, No. 85-456 (June 11, 1986) slip op. 11 ("The structure of § 345 strongly suggests \* \* \* that § 345 itself waives the Government's immunity only with respect to \* \* \* [suits] seeking an original allotment.") The court further held that the suits were in any event time-barred under 28 U.S.C. 2401(a), which provides a six-year limitations period for "every civil action commenced against the United States" (Pet. App. 55-57). The court dismissed the actions against the remaining defendants on the ground that the United States was an indispensable party to the suits (*id.* at 57).

In the other eleven cases, consolidated in the Central District of South Dakota, the district court reached the merits and granted summary judgment for the defendants. The court held that the Burke Act did not require a prior

application by an individual Indian or an individualized determination of competency before a valid fee patent could be issued by the Secretary of the Interior (Pet. App. 68-81, 87-94); the allottees did not have a vested right under the due process clause of the Fifth Amendment to retain restrictions on the alienation of their allotments until the expiration of the trust period provided for in the General Allotment Act or until the allottees applied for fee patents (*id.* at 81-87); the use of age and blood quantum to determine the competency of individual allottees was not constitutionally infirm (*id.* at 95-97); and the actions of the allottees, including the subsequent sale of the property held under fee patent, constituted consent to the issuance of the fee patents (*id.* at 97-106).

3. The court of appeals affirmed the dismissal of all 14 cases in a single, consolidated appeal. The court held that the actions against the United States were time-barred and that the United States was an indispensable party to each of the suits. The court thus found it unnecessary to reach the additional issues of whether the United States had consented to be sued and whether the forced fee patents were legal (Pet. App. 16).

The court of appeals found the language of Section 2401(a) to be "clear and definitive," with no exception provided for Indian suits brought under 25 U.S.C. 345 (Pet. App. 24). The court accordingly agreed with the Ninth Circuit that the general statute of limitations applicable to civil actions against the United States applies to suits based on Indian allotments. See *Christensen v. United States*, 755 F.2d 705 (1985), cert. denied, No. 85-372 (June 16, 1986); *Loring v. United States*, 610 F.2d 649 (1979). Concluding that petitioners' causes of action had accrued no later than 1948, when 28 U.S.C. 2401(a) was enacted, the court of appeals held that petitioners' (or their ancestors') failure to bring the actions within six years of that date barred the suits (Pet. App. 26).

The court of appeals rejected petitioners' contention that because the forced fee patents were void ab initio, no

statute of limitations applied to their actions to reassert their rights under the original allotments. Petitioners, relying on the court of appeals' own decision in *Mottaz v. United States*, 753 F.2d 71, 74 (1985), rev'd, No. 85-546 (June 11, 1986), argued that a cause of action cannot accrue on a void transaction and that, since the Secretary exceeded his authority in issuing the fee patents, the patents were ineffective to terminate the trust created by the General Allotment Act. The court of appeals noted that although the Supreme Court did not apply 28 U.S.C. 2401(a) in *Mottaz*, "the Court's rejection of our holding [that a statute of limitations could not run against a void patent] is implicit in its holding that the statute of limitations in the Quiet Title Act barred the action" (Pet. App. 27).

The court of appeals further held that, in any event, the patents at issue here were not void but, at most, voidable (Pet. App. 28). "Simply put," the court explained, "a fee patent is void if the Secretary lacked the power to confer it. The fee patent is voidable if the Secretary had the power, but used it wrongly" (*id.* at 29-30). The Burke Act clearly granted to the Secretary the power to issue the fee patents. Petitioners, the court concluded, are simply arguing that he used that power wrongly. At most, therefore, the patents were voidable and required legal action, now time-barred, to challenge their validity. *Id.* at 30.

Applying the analytic framework set out by this Court in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 109-111 (1968), the court of appeals further concluded that the United States was an indispensable party to the litigation and that, therefore, the suits against the remaining defendants were properly dismissed. The court noted that the essence of each of these suits was "the assertion that the United States wrongfully issued the fee patents" (Pet. App. 38). The court distinguished this case from the "many private disputes that relate to land claims

originally granted by various allotment acts" (*Mottaz*, slip. op. 11 n.9) in which the United States is not an indispensable party. Here, the action of the United States in issuing the fee patents, not the subsequent fate of those patents, is in question. "[T]he result of this suit, on the merits, would depend entirely on whether the United States acted legally or illegally in granting fee patents under the blood quantum policy" (Pet. App. 37). Furthermore, "if [petitioners] prevailed in this suit, the United States would be reinstated as trustee over the land, with the concomitant resumption of fiduciary responsibility, and could also be subject to claims for damages by the present owners" (*ibid.*). Under these circumstances, the court concluded, "the absence of the United States from this suit requires dismissal of the suit in its entirety, with prejudice, against all [petitioners]" (*id.* at 39).

#### ARGUMENT

The court of appeals correctly concluded both that the suits against the United States were time-barred and that the United States is an indispensable party to this litigation. Those decisions do not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. The language of 28 U.S.C. 2401(a) is, as the court of appeals concluded, both "clear and definitive" (Pet. App. 24). The statute provides:

Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.

The Contract Disputes Act of 1978 has no bearing on this suit. Thus, there is no way for petitioners to avoid the all-inclusive language of the limitations period, applying as it does to "every civil action commenced against the United States."

Petitioners contend that Section 2401(a) contains an implicit exception for Indian suits brought under 25 U.S.C. 345. Their argument relies both on the historic fact that prior to the enactment of Section 2401(a) in 1948 no statute of limitations applied to such suits and on the special trust relationship that Indians have with the United States. Petitioners, however, are simply ignoring “[t]he basic rule of federal sovereign immunity,” which is that “the United States cannot be sued at all without the consent of Congress.” *Block v. North Dakota*, 461 U.S. 273, 287 (1983). “A necessary corollary of this rule” is that “[w]hen waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity” (*ibid*). Such a condition must be “strictly observed, and exceptions thereto are not to be lightly implied” (*ibid*). Accordingly, before a court may find that Congress intended to exempt a particular litigant or cause of action from a general limitations period, there must be “clear indication of such an intention” (*ibid*). No such indication, clear or opaque, is to be found here.

In *United States v. Mottaz, supra*, this Court held that the 12-year limitations period in the Quiet Title Act of 1972, 28 U.S.C. 2409a, barred an ancient cause of action on land allotments brought by an Indian against the United States. The Court there declined to read an exception, either historical or equitable, into the clear language of the limitations period. “Federal law,” the Court noted, “rightly provides Indians with a range of special protections. But even for Indian plaintiffs, [a] waiver of sovereign immunity “cannot be lightly implied but must be unequivocally expressed.”’ Slip op. 16 (quoting *United States v. Mitchell*, 445 U.S. 535, 538 (1980), quoting *United States v. King*, 395 U.S. 1, 4 (1969)). The same considerations apply to the suits in question here. Absent any expression of intent to provide an exception for Indian

suits brought under 25 U.S.C. 345, the all-inclusive limitations period in Section 2401(a) must be deemed to apply to such suits.

The precise arguments to the contrary made by petitioners were discussed and rejected by the Ninth Circuit in *Christensen v. United States, supra*. There, several Indians sought a declaratory judgment that the United States had an obligation to provide access over private land to their allotment, asserting that 28 U.S.C. 2401(a) did not bar their 20-year-old claim because the statute applied only to legal actions and, in any event, did not apply to Indian claims. The court of appeals held that 28 U.S.C. 2401(a) applied to both legal and equitable actions, and that, while prior to the 1948 changes in the Judicial Code Indian claims were treated differently, 28 U.S.C. 2401(a) "was not a mere codification of prior law, but also a revision" (755 F.2d at 707). See also *Werner v. United States*, 188 F.2d 266, 268 (9th Cir. 1951) (Section 2401(a) "not only served to consolidate the provisions of [prior laws], it also created a general statute of limitations insofar as suits against the United States are concerned"). Accord *Walters v. Secretary of Defense*, 725 F.2d 107, 113 (D.C. Cir. 1983). The court of appeals also found no support for the argument that the six-year statute of limitations did not apply because of "the special trust relationship between the United States and American natives" (755 F.2d at 707-708). See also *Big Spring v. United States Bureau of Indian Affairs*, 767 F.2d 614, 616-617 (9th Cir. 1985), cert. denied, No. 85-1380 (June 16, 1986); *Menominee Tribe of Indians v. United States*, 726 F.2d 718, 721 (Fed. Cir.), cert. denied, 469 U.S. 826 (1984).

Petitioners, citing this Court's decision in *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985), also argue that the limitations period imposed by 28 U.S.C. 2401(a) is "inconsistent" with 28 U.S.C. 2415 (Pet. 20).<sup>3</sup>

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<sup>3</sup> Originally enacted in 1966, 28 U.S.C. 2415 imposes a statute of limitations on various actions brought by the United States generally, including those on behalf of Indians.

The latter provision, however, has nothing whatsoever to do with this case. As this Court recently noted in *United States v. Mottaz*, slip op. 13 n.10, “[Section] 2415 is expressly inapplicable to actions ‘to establish the title to, or right of possession of, real or personal property.’” Since the claims at issue here are “to establish the title to, or right of possession of, real \* \* \* property,” 28 U.S.C. 2415 does not apply.<sup>4</sup>

2. Petitioners contend (Pet. 12-17) that the court of appeals’ conclusion that the United States is an indispensable party to this litigation conflicts “in principle” with this Court’s decisions in *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968) and *Hodel v. Irving*, No. 85-637 (May 18, 1987). While both of those cases upheld the standing of the Indian plaintiffs to sue, neither of them has anything at all to do with the analytic framework for determining whether or not someone is an “indispensable” party within the meaning of Rule 19(b), Fed. R. Civ. P. That framework is clearly set out in this Court’s decision in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. at 109-111, and the court of appeals was scrupulous in

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<sup>4</sup> Petitioners contend (Pet. 21) that the court of appeals also erred in citing 25 U.S.C. 347 as a “potential independent source of limitation” (Pet. App. 33-34). Petitioners are wrong in two respects. First, the allotment process on the Rosebud Reservation began with the Treaty with the Sioux Indians in 1868 and, thus, the Sioux allotments are within the statutory category of “lands patented in severalty to the members of any tribe of Indians under any treaty between it and the United States \* \* \*” (25 U.S.C. 347). Second, and in any event, under the analysis employed by the Ninth Circuit in *Blake v. Arnett*, 663 F.2d 906, 909-910 (1981), construing this Court’s decisions in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), and *Antoine v. Washington*, 420 U.S. 194 (1975), there is no significant distinction between a right secured by treaty and one secured by statute. See, e.g., *Fields v. United States*, 423 F.2d 380 (Ct. Cl. 1970) (applying 25 U.S.C. 347 to a claim dealing with an allotment under statute). Thus, the court of appeals was correct in concluding that 25 U.S.C. 347 provides an independent bar to petitioners’ suits.

adhering to it. Petitioners' dispute is not with the test applied by the court of appeals, but rather with the weight given to the various factors present in this case. "The 'interests' that the Court found controlling," petitioners contend (Pet. 13), "do not warrant such weight." That fact-specific contention, even if it were otherwise cert-worthy, is incorrect in the circumstances presented here.

In *Provident Trademens Bank & Trust Co.*, this Court identified "four 'interests' that must be examined in each case to determine whether, in equity and good conscience, the court should proceed without a party whose absence from the litigation is compelled" (390 U.S. at 109): (1) the plaintiff's interest in having a forum; (2) the defendant's interest in avoiding multiple litigation, or inconsistent relief, or sole responsibility for a liability he shares with another; (3) the interest of the party alleged to be indispensable; and (4) the interest of the courts and the public in complete, consistent, and efficient settlement of controversies. *Id.* at 109-111. Petitioners' assertion (Pet. 13) that their interest in having a forum for their claims should be given "controlling weight" simply jettisons the other three-fourths of this inquiry.

The other defendants in this case are not alleged to have engaged in any wrongdoing. The legality of only the original grants of the forced fee patents is at issue in this litigation, not the subsequent transfers of the property by which the other defendants ultimately obtained it. Yet, if the plaintiffs were to prevail, these defendants would not only be faced with "multiple litigation" (in a suit to attempt to recover the value of their land from the United States) and the prospect of inconsistent relief (since the patents found invalid in one forum might prove valid in another); they would also be faced with the possibility of bearing "sole responsibility" for an alleged liability in which they should not share at all.

The interests of the United States are also at issue here since it is the alleged wrongdoing of the United States which forms the gravamen of petitioners' complaint and must inevitably be litigated in any suit against the remaining defendants. Petitioners' suit is first and last a suit against the United States, with inevitable consequences for the United States. For petitioners to prevail, the United States must be found to have wrongfully issued the patents, and the consequence of their prevailing would be that the United States would be reinstated as trustee of the lands in question with all the fiduciary responsibilities of a trustee. The United States would also be subject to the present owners' attempts to claim damages, and although the finding of liability in the first suit would not be res judicata against the United States "in the technical sense," it would "as a practical matter impair or impede" the ability of the United States to defend its actions on the merits (390 U.S. at 110). Such matters directly affecting both the liability and the responsibility of the United States should not be determined in litigation in which it is not a party.

Finally, there is the interest of the courts and the public generally in avoiding lengthy, piecemeal litigation in which the uncertainty cast upon thousands of land titles by these suits would be unduly prolonged. The court of appeals carefully balanced these factors and properly concluded that the United States is an indispensable party in the circumstances of this case.<sup>5</sup> That balance does not reflect an "assumption that if someone has to suffer, it may as well be the Indians" (Pet. 14). It reflects, rather, a principle crucial to our judicial system, "found and approved in all systems of enlightened jurisprudence," which is simply

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<sup>5</sup> The court of appeals did not hold nor do we suggest that the United States is an indispensable party to all suits brought by Indians under 25 U.S.C. 345. See *Mottaz*, slip op. 11 n.9.

that "the right to be free of stale claims in time comes to prevail over the right to prosecute them" (*Block v. North Dakota*, 461 U.S. at 287).<sup>6</sup>

### CONCLUSION

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

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AUGUST 1987

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<sup>6</sup> Petitioners also address the merits of their case (Pet. 17-19), contending that the fee patents were void ab initio because their issuance was conditioned both on prior application by allottees and individual determinations of competence by the Secretary of the Interior. Since, however, the court of appeals found it "unnecessary to resolve the legality of the forced fee patents \* \* \* because the statute of limitations issue is dispositive" (Pet. App. 16), that issue is not properly presented for review. To the extent that petitioners are trying, without directly saying so, to revive their argument in the court of appeals (*id.* at 26-30) that no statute of limitations can bar their claims *because* the fee patents were void ab initio, that claim is untenable for the reasons given by the court of appeals. A similar argument was also rejected by this Court in an analogous context in *Mottaz* (slip op. 16-17).